

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	
Competition in the Market for the)	
Delivery of Video Programming)	
)	MB Docket No. 04-227
Implementation of the)	
Communications Act of 1934, as amended –)	
)	
Annual Report (“ <i>2004 Report</i> ”) to Congress –)	
<i>Access to Programming by Persons with Disabilities</i>)	

**SUPPLEMENTAL COMMENTS OF THE
NATIONAL ASSOCIATION OF THE DEAF**

**Procedures for Applying for an Exemption
from the Commission’s Closed Captioning Rules
Based on an Undue Burden**

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Dated: July 22, 2004

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I. Introduction

Established in 1880, the National Association of the Deaf (“NAD”) is the nation's oldest and largest nonprofit organization safeguarding the accessibility and civil rights of 28 million deaf and hard of hearing Americans across a broad range of areas including education, employment, health care, and telecommunications. Primary areas of focus include grassroots advocacy and empowerment, policy development and research, legal assistance, captioned media, information and publications, and youth leadership.

The NAD provides these comments, as a supplement to comments filed jointly with Telecommunications for the Deaf, Inc. (TDI), in response to the Notice of Inquiry (“Notice”), MB Docket No. 04-227, soliciting data and information on the status of competition in the market for the delivery of video programming for the “2004 Report.”

In the Notice, the Commission requested comments about *Access to Programming by Persons with Disabilities* (Item 23). This response provides comments with respect to the following specific question:

Are the procedures for applying for an exemption based on an undue burden sufficient?¹

In short, the procedures are not sufficient.

First, the procedures do not provide for initial review for sufficiency before posting by Public Notice for comments and opposition.

Second, and as further described below, a program provider who files a petition, regardless of the merits, is effectively exempt from the Commission's captioning rules for at least two years pending Commission determination of undue burden. This cannot be the result intended when the Commission promulgated the procedures under 47 C.F.R. § 79.1(f).

II. Procedures for Applying for an Exemption Based on Undue Burden

Some video programming programs and providers are exempt from the Commission's closed captioning rules.² Specifically, 47 C.F.R. § 79.1(d)(2) provides the possibility for a waiver for video programming or providers when “the Commission has determined that a requirement for closed captioning imposes an undue burden [a significant difficulty or expense] on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.”

Section 79.1(f) of the Commission's rules sets forth the Commission's procedures for seeking an exemption from the closed captioning requirements on the basis that compliance would impose an undue burden.³ A petition for an exemption must be supported by sufficient

¹ 47 C.F.R. § 79.1(f).

² See 47 C.F.R. § 79.1(d).

³ 47 C.F.R. § 79.1(f).

evidence to demonstrate that compliance with the closed captioning requirements would cause an undue burden.⁴ Such petition must contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on by the petitioner.⁵ It must also describe any available alternatives that might constitute a reasonable substitute for the captioning requirements.⁶

When determining whether the closed captioning requirements would impose an undue burden, the Commission considers the following factors: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.⁷

III. Status of Petitions Filed

The following chart summarizes the number of petitions received by the Commission and posted by Public Notice for comments and opposition, the status of those petitions, and the number of petitions that remain undecided, by year.⁸

Petitions for Exemption from Closed Captioning Rules – 47 C.F.R. § 79.1 Posting of Public Notice and FCC Decision or Outcome			
	Public Notices	FCC Decision or Outcome	Undecided
1999	3 petitions	2 partial grants / 1 denied	---
2000	0 petitions	---	---
2001	3 petitions	2 denied	1 petition (33%)
2002	17 petitions	1 withdrawn / 6 denied	10 petitions (59%)
2003	6 petitions	1 withdrawn	5 petitions (83%)
2004	24 petitions	1 withdrawn	23 petitions (96%)

Updated 7/12/04

⁴ 47 C.F.R. § 79.1(f)(2).

⁵ 47 C.F.R. § 79.1(f)(9).

⁶ 47 C.F.R. § 79.1(f)(3).

⁷ *Id.*

⁸ The information contained in this chart was obtained by searching the Commission's Web site, www.fcc.gov.

IV. Insufficiency of Petitions Filed

A review of the petitions filed in 2004, and the Commission's decisions released to date (with little exception), suggests that no preliminary or initial review of a petition is conducted before the Public Notice is posted inviting comments and opposition.

Comments and oppositions, as well as the Commission's decisions, routinely focus on the substantive insufficiency of the petitions themselves, including the petitioners' routine failure to provide information addressing the undue burden factors outlined in the Commission's closed captioning rules. The vast majority of the petitions filed are not "supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue burden."⁹ These petitions routinely fail to provide a detailed, full showing of facts or considerations relied on in the petition, supported by affidavit, as required by Commission rules.¹⁰ Instead, petitions rely almost exclusively on unsupported assertions and suppositions.

According to the rules, petitioners may reply, within 20 days of the close of the comment period, to the comments or oppositions filed.¹¹ In the reply, a petitioner may provide some or all of the information needed to appropriately determine whether an undue burden would result from compliance with the Commission's captioning rules. Unfortunately, petitioner's reply is not subject to the public notice provision. Even more unfortunately, the rules do not establish procedures or time for respondents or the public to provide informed comments or opposition.

⁹ 47 C.F.R. § 79.2(f)(2).

¹⁰ 47 C.F.R. § 79.2(f)(9).

¹¹ 47 C.F.R. § 79.2(f)(6).

One possible solution might be for the Commission to make available petitioner's reply, by public notice, and lengthen the comment period or establish a time period for comments and opposition. However, this additional procedure would serve to lengthen the time under which such petitions are undecided. Instead, establishing a preliminary or initial review process, to determine whether the petition provides sufficient information, and to reject those that do not, appears to be warranted. Such a process would ultimately conserve valuable Commission's resources and can be established.¹²

V. Processing Delays

The amount of time that elapses between the receipt of the petition by the Commission and the posting of the Public Notice for the comment and reply period and between the end of the comment and reply period and the Commission's determination is significant.

Administrative delay occurs with the posting of the Public Notice of the filing of the petition itself. For the petitions filed in 2004, an average of **3.25 months** elapsed between the time the petition was filed with the Commission and the time the Public Notice was issued. The delay between receipt and posting has been steadily increasing. *For the most recently posted petitions, a full 6.0 months had elapsed before posting.* See Exhibit 1.

Even more significant administrative delay occurs between the posting of the Public Notice for comment and reply and the Commission's determination. See Exhibit 2. Two of the three petitions filed in 2001 were only just recently decided – *28 months after the Public Notice was posted.* Six of the 17 petitions filed in 2002 were decided an average of 20.5 months later.

¹² See 47 C.F.R. § 79.1(f)(8).

None of the petitions filed in 2003 or 2004 have been decided. The average elapsed time for the 11 petitions that have completed the petition process (out of a total of 53 petitions filed) since 1999 is **20.5 months** (see summary chart next).

Petitions for Exemption from Closed Captioning Rules – 47 C.F.R. § 79.1 Posting of Public Notice and FCC Decision or Outcome			
	Public Notices	FCC Decision or Outcome	Elapsed Time
1999	3 petitions	2 partial grants / 1 denied	16 months average
2000	0 petitions	---	---
2001	3 petitions	2 denied	28 months average
2002	17 petitions	1 withdrawn / 6 denied	20.5 months average
2003	6 petitions	1 withdrawn	
2004	24 petitions	1 withdrawn	

Updated 7/12/04

Furthermore, when petitions are denied, the Commission routinely provides an additional **3.0 months** from the date of the determination before the program provider must comply with the Commission's closed captioning rules.¹³

*While these petitions for exemption are pending Commission determination, the programming that is the subject of the petition for exemption is considered exempt.*¹⁴

Based on the information available from the Commission's Web site about past petitions for exemption, a program provider can expect 3.25 months to elapse after the Commission receives the petition before the petition is formally placed on Public Notice, 20.5 months to elapse after the Public Notice is issued, and 3.0 months additional time if the petition is denied before the program provider is required to comply with the Commission's closed captioning rules. Therefore, based on the record, *a program provider that files a petition for exemption, regardless of the merits of the petition, can now routinely expect to be considered exempt for at*

¹³ See, e.g., Commonwealth Productions, Video Programming Accessibility, Petitioner for Waiver of Closed Captioning Requirements, CSR 5992, Memorandum Opinion and Order, ¶ 3 (Mar. 26, 2004).

¹⁴ See 47 C.F.R. § 79.1(f)(11).

least two years. This process and effect can be repeated if the petitioner accepts the Commission's invitation to file another petition with additional information (in effect, starting the review process over again). This cannot be the result intended when the Commission promulgated the procedures under 47 C.F.R. § 79.1(f).

Attention needs to be focused by the Commission to address and reduce the administrative delay in processing these petitions for exemption, including but not limited to establishing a preliminary or initial review process.

VI. Conclusion

The procedures for applying for an exemption based on an undue burden are not sufficient.

It is recommended that the Commission adopt procedures to provide for preliminary or initial review of petitions for exemption for sufficiency, and to reject those petitions that are not sufficient, before posting by Public Notice for comments and opposition.

It is further recommended that the Commission focus attention to address and reduce the administrative delay in processing petitions for exemption.

Respectfully submitted,

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Exhibit 1

Petitions for Exemption from Closed Captioning Rules – 47 C.F.R. § 79.1 Receipt by FCC and Posting of Public Notice				
CSR	Description	Rec'd by FCC	Public Notice	Elapsed Time
6280	Outreach Ministries	11/25/03	1/15/04	1.75 months
6281	Lamb & Lion	11/28/03 (written)	1/15/04	1.5 months
6282	Lincoln Wood	11/18/03 (written)	1/15/04	2.0 months
6283	Lewis Memorial	12/01/03 (written)	2/11/04	2.25 months
6284	Abundant Life	12/16/03	2/24/04	2.25 months
6285	Bethel Harvest Church	12/18/03	2/24/04	2.25 months
6287	Awakening Ministries	12/16/03 (written)	2/24/04	2.25 months
6288	Love A Child	12/29/03	3/15/04	2.5 months
6289	Brown Trail Church	12/30/03	3/15/04	2.5 months
6290	Call to Excellence	12/29/03	3/15/04	2.5 months
6291	Covenant International Church	1/2/04	3/26/04	2.75 months
6292	LifePoints Ministries	1/12/04	3/26/04	2.5 months
6293	Dr. Jack Ditty	1/5/04	4/5/04	3.0 months
6294	New Life Team	12/29/03	4/5/04	3.25 months
6295	Quail Valley Church	12/24/03	4/6/04	3.5 months
6297	Healing Miracles Ministries	12/29/03	4/6/04	3.25 months
6308	Maranatha Fellowship	1/23/04	4/6/04	2.5 months
6309	VCG Communications	1/30/04	4/6/04	2.25 months
6296	WDLP Broadcasting Co.	1/9/04	6/4/04	4.75 months
6298	PowerPoint Ministries	12/15/03	6/4/04	5.5 months
6310	Prophetic Miracle Ministries	12/29/03 (written)	6/4/04	5 months
6314	Cathedral of Praise	12/23/04	6/28/04	6 months
6315	Living Word Bible Church	12/16/03 (written)	6/28/04	6.25 months
6316	Highland Park Baptist Church	12/24/03	7/2/04	6.25 months
	24 petitions		2004	3.25 months average.

Last updated 7/12/04.

Exhibit 2

Petitions for Exemption from Closed Captioning Rules – 47 C.F.R. § 79.1 Posting of Public Notice and FCC Decision or Outcome				
CSR	Description	Public Notice	FCC Decision or Outcome	Elapsed Time
5443	Outland Sports	10/27/99	7/9/01 – granted for 1 year to 7/9/02	20 months
5444	Wild Outdoors	10/27/99	7/9/01 – granted for 1 year to 7/9/02	20 months
5459	Home Shopping Club	12/08/99	6/19/00 – denied	7 months
	3 petitions posted	1999	2 partial grants / 1 denied	16 months average
	0 petitions posted	2000		
5808	Outdoors with Joey Mines	12/20/01	4/28/04 – denied	28 months
5809	Bob Dillow Promotions	12/20/01	4/23/04 – denied	28 months
5810	Geurink Outdoor Adventures	12/20/01		
	3 petitions posted	2001	2 denied	28 months average
5832	Adventure Bound Outdoors	1/9/02		
5536	USA Broadcasting	1/9/02	1/24/02 – withdrawn	
5827	ABS-CBN	2/14/02		
5861	Northeast Outdoors	3/19/02		
5867	Xtreme Productions	6/27/02	5/7/04 – denied	23 months
5881	Sportsmans Showcase	6/27/02		
5882	Engel's Outdoor Experience	6/27/02	4/14/04 – denied	22 months
5916	America's Collectible Network	6/27/02		
5923	Hunting & Fishing	8/14/02	4/15/04 – denied	20 months
5950	Avery Outdoor Enterprises	8/14/02		
5917	CrossTalk TV Ministry	9/12/02		
5957	Yellow House Entertainment	9/12/02	6/24/04 – denied	21 months
5979	Complete Video Productions	9/12/02		
5949	Wild Outdoors	9/18/02		
5991	Ozark Mountain	10/11/02	6/22/04 – denied	20 months
5992	Commonwealth Productions	10/11/02	3/26/04 – denied	17 months
6052	Coastal Sportsman	12/24/02		
	17 petitions posted	2002	1 withdrawn / 6 denied	20.5 months average

Petitions for Exemption from Closed Captioning Rules – 47 C.F.R. § 79.1 Posting of Public Notice and FCC Decision or Outcome				
CSR	Description	Public Notice	FCC Decision or Outcome	Elapsed Time
6107	PJ Productions	2/14/03		
6213	Newsom Productions	7/30/03		
6214	A-Way-Outdoors	7/30/03		
6257	Gaudino Family Fitness	12/9/03		
6263	Ankerberg	12/22/03	2/6/04 – withdrawn	
	6 petitions posted	2003	1 withdrawn	
6280	Outreach Ministries	1/15/04	3/26/04 – withdrawn	
6281	Lamb & Lion	1/15/04		
6282	Lincoln Wood	1/15/04		
6283	Lewis Memorial	2/11/04		
6284	Abundant Life	2/24/04		
6285	Bethel Harvest Church	2/24/04		
6287	Awakening Ministries	2/24/04		
6288	Love A Child	3/15/04		
6289	Brown Trail Church	3/15/04		
6290	Call to Excellence	3/15/04		
6291	Covenant International Church	3/26/04		
6292	LifePoints Ministries	3/26/04		
6293	Dr. Jack Ditty	4/5/04		
6294	New Life Team	4/5/04		
6295	Quail Valley Church	4/6/04		
6297	Healing Miracles Ministries	4/6/04		
6308	Maranatha Fellowship	4/6/04		
6309	VCG Communications	4/6/04		
6296	WDLP Broadcasting Co.	6/4/04		
6298	PowerPoint Ministries	6/4/04		
6310	Prophetic Miracle Ministries	6/4/04		
6314	Cathedral of Praise	6/28/04		
6315	Living Word Bible Church	6/28/04		
6316	Highland Park Baptist Church	7/2/04		
	24 petitions posted	2004	1 withdrawn	

Last updated 7/12/04.